No. 10,792.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY ASHTON, as Trustee in Bankruptcy of the Estate of Charles Ralph Senteney,

Appellee.

vs.

CHARLES RALPH SENTENEY,

Appellee.

APPELLANT'S OPENING BRIEF.

EARL E. MOSS,
841 South Serrano, Los Angeles 5,

LOUIS LOMBARDI,
528 Associated Realty Building, Los Angeles 14,

Attorneys for Appellant.

FILED
AUG 2 1946
CLERK

Parker & Company, Law Printers, Los Angeles. Phone TR. 5208.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

Cases.

Statutes.

No. 10,792.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY ASHTON, as Trustee in Bankruptcy of the Estate of Charles Ralph Senteney,

Appellee.

vs.

CHARLES RALPH SENTENEY,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

In the course of the bankruptcy proceedings of Charles Ralph Senteney the referee made findings of fact and an order [Rec. pp. 35 to 45] denying the trustee's petition for an order revoking the bankrupt's discharge, and denying the trustee's petition for an order that he was the owner of the bankrupt's interest in a certain trust known as Trust No. 245 with the First National Bank of Santa Ana, California. A review of the referee's order was had in the District Court pursuant to Section 39c of the Bankruptcy Act [Rec. pp. 46-47]. The District Judge adopted the findings of the referee [Rec. pp. 51-52]. From the order of the District Judge an appeal was taken to this court [Rec. p. 53] under the provisions of Section 24a of the Bankruptcy Act.

Statement of the Case.

Charles Ralph Senteney, the bankrupt herein, was the nephew of W. A. Huff and Edith Huff, who created the trust in the First National Bank of Santa Ana, California, mentioned in this proceeding. W. A. Huff died in October, 1927, and Edith Huff on April 20, 1943. The bankrupt resided in Los Angeles since 1924, from which date, until the death of W. A. Huff in 1927, the bankrupt saw his aunt and uncle an average of once a month. Within thirty days of the death of W. A. Huff, Edith Huff showed the bankrupt a copy of the declaration of trust [Rec. pp. 67-68], and he had a copy in his possession for sometime. During the last ten or twelve years on an average of six months in the year the bankrupt saw Edith Huff daily [Rec. p. 69], and lived next door to her except when she went to Balboa. She consulted the bankrupt frequently concerning her property matters [Rec. p. 70].

The bankrupt filed a voluntary petition in bankruptcy on October 16, 1942 [Rec. pp. 2-3]. At the time the bankrupt consulted his attorney regarding the filing of such petition he discussed the matter of the trust with him [Rec. p. 72]. Possibly a year or eighteen months prior to the filing of the petition in bankruptcy the bankrupt took a copy of the declaration of trust to his attorney and consulted him concerning income from the trust, in which matter the bankrupt was representing Edith Huff [Rec. pp. 73-74]. Several other times the bankrupt represented Edith Huff in income matters concerning the trust. His aunt was not well at the time. On such occasions the bankrupt discussed the matter of the trust with the trust officers of the bank in connection

with income. On the occasion that the bankrupt first discussed his bankruptcy with his attorney, he told his attorney what the trust contained concerning himself [Rec. p. 74]. At the time that the bankrupt took up the matter of the income from the trust with his attorney he believed that his attorney made a copy of the trust. The bankrupt did not remember whether at the time of the discussion of the bankruptcy proceedings his attorney brought out a copy of the declaration of trust and discussed it with him, but he would be inclined to say that he did [Rec. p. 75]. The bankrupt's aunt had a copy of the trust at her house which he had looked over.

In Schedule B-4, verified and filed by the bankrupt, calling for a description of "property in reversion, remainder or expectancy, including property held in trust for the debtor, or subject to any power or right to dispose of or to charge", the bankrupt filled in the word "none" in four places [Rec. p. 40].

At or immediately prior to the filing of the schedules in bankruptcy, the bankrupt's attorney, Martin Goldman, had in his possession a copy of the trust and some of the amendments. At that time he was generally familiar with the terms of the trust [Rec. p. 96]. Prior to the preparation of the schedules in bankruptcy Martin Goldman considered the terms of the trust as to whether or not there was any interest of property, expectancy or otherwise, which the bankrupt should schedule in his schedules, and discussed the matter with the bankrupt. After fifteen or twenty hours briefing the subject he gave the bankrupt an opinion that he had no interest in the trust and that it need not be scheduled and he did not include it in the schedules [Rec. p. 97]. Martin Goldman testified that

he did not have any intent to conceal from the trustee or creditors the existence of any property or to cause his client to conceal any property from the court or trustee, or to cause his client to make a false oath [Rec. p. 98].

The brief which Martin Goldman prepared as a basis for his advice to the bankrupt that the interest in the trust need not be described in the schedules, was introduced in evidence as Trustee's Exhibit 2, and appears on pages 239 to 244 of the record. According to the findings [Finding VII, Rec. p. 41], the first three pages of this brief were prepared prior to filing the schedules. The fourth page of the original brief begins with the words "The crime of conspiracy", etc., about the center of page 243 of the record.

Four or five days after the matter of the bankruptcy was first discussed between the bankrupt and his attorney, the attorney gave the bankrupt an opinion as to whether or not the interest in the trust should be described in the schedules, and in that conversation he told the bankrupt that he had no interest in the trust, and therefore it should not be included in the schedules [Rec. p. 101]. He did not have any discussion with the bankrupt wherein the advisability of setting forth all the facts in the schedules was discussed. He explained to the bankrupt the meaning of Schedule B-4 but did not discuss it with him. They had no discussion as to whether or not it would be advisable to set all the facts forth in the schedules and let the court determine whether or not there was any title or anything that passed to the trustee. Several times, maybe one or two, before the schedules were filed, the bankrupt and Martin Goldman, his attorney, discussed generally the bankrupt's assets and liabilities. In that discussion they discussed the possibility that the

bankrupt might have an interest in the trust. The bankrupt's attorney got out a copy of the trust and told the bankrupt that he could not tell him at once whether that was an asset or not, and five or six days or maybe a week later he told the bankrupt it was not [Rec. p. 103]. The reason the bankrupt gave his attorney for desiring to file the petition in bankruptcy was that he had been in the real estate business and in the construction business, and because of the war that business had ceased and he couldn't get any more materials; he had been out of business at that time for practically a year and a half and he was simply eating up his accumulated earnings trying to keep his office open; he was taking his medical examination and he had an obligation to his brother-in-law coming due of many thousands of dollars, and if he went into the army he wanted to feel free and easy about his obligations. He did not say anything to his attorney about the fact that his aunt was getting old and her health was not any too good and he had better get this thing cleared up before she died so the creditors wouldn't grab it. The age or condition of health of the bankrupt's aunt was not discussed at all and the effect of her death, permitting creditors to acquire what he received or might receive from her was not discussed until after the first meeting of creditors. The bankrupt's attorney had not explained to the bankrupt prior to the first meeting of creditors the provisions of the law concerning any property that he might acquire by devise or descent within six months after the filing of the petition [Rec. p. 105]. The bankrupt's attorney had met the bankrupt's aunt and knew she was of advanced age and poor health, but she had been in poor health for many years [Rec. p. 106].

The referee found that the interest in the trust should have been described in the bankrupt's schedules, but that the bankrupt was not guilty of any bad faith or concealment of assets or knowingly or intentionally making a false oath [Rec. p. 42], and denied both the petition for an order revoking the bankrupt's discharge and the petition for an order that the trustee was the owner of the bankrupt's interest in the trust. The District Judge adopted the referee's findings and order.

Summary of Argument.

1. THE LAW PRESUMES THAT THE OMISSION OF THE INTEREST IN THE TRUST FROM THE SCHEDULES WAS INTENTIONAL AND FRAUDULENT, AND THE BANKRUPT DID NOT OVERCOME THIS PRESUMPTION, AND HIS DISCHARGE SHOULD BE REVOKED UNDER SECTION 15 OF THE BANKRUPTCY ACT.

2. THE BANKRUPT WAS NOT WARRANTED IN RELYING UPON THE ADVICE OF COUNSEL WITH REFERENCE TO PLAIN, PALPABLE AND TRANSPARENT FACTS.

3. WHILE THE PROVISIONS OF THE TRUST PROHIBITED ALIENATION AND LEVY BY CREDITORS DURING ITS EXISTENCE, IT TERMINATED UPON THE DEATH OF EDITH HUFF, AND THE BANKRUPT COULD HAVE ASSIGNED HIS INTERST AT ANY TIME, EFFECTIVE AS OF THE DATE OF THE TERMINATION OF THE TRUST, AND THEREFORE TITLE TO THE BANKRUPT'S INTEREST PASSED TO THE TRUSTEE, EFFECTIVE AS OF THE DATE OF THE TERMINATION OF THE TRUST.

4. EVEN IF THE TITLE DID NOT PASS TO THE TRUSTEE, THE TRUSTEE IS IN THE POSITION OF THE MOST FAVORED CREDITOR AND IS ENTITLED TO THE SAME EQUITABLE RELIEF THAT WAS GIVEN THE PLAINTIFF IN KELLEY V. KELLEY.

ARGUMENT.

1. **The Law Presumes That the Omission of the Interest in the Trust From the Schedules Was Intentional and Fraudulent, and the Bankrupt Did Not Overcome This Presumption, and His Discharge Should Be Revoked Under Section 15 of the Bankruptcy Act.**

Bankruptcy Act, Section 15:

> "The Court may, upon application of parties in interest who have not been guilty of undue laches, filed at any time within one year after the discharge shall have been granted, revoke it if it shall be made to appear that it was obtained through the fraud of the bankrupt, that the knowledge of the fraud has come to the petitioners since the granting of the discharge and that the actual facts did not warrant the discharge."

The petition for an order revoking the discharge [Rec. pp. 5-6] alleged all the facts necessary under Section 15, and the referee found in favor of petitioner on all issues except that the discharge was obtained through the fraud of the bankrupt and that the actual facts did not warrant the discharge.

Farmers' Savings Bank, et al. v. Anton, 1 F. (2d) 103 (C. C. A. 8):

> "The filing of the petition in bankruptcy and the schedules, in legal effect, amounted to a solemn declaration and representation by the bankrupt to the bankruptcy court, the trustee and the creditors that every statement contained therein was true, and that every item of property belonging to the bankrupt and which under the Bankruptcy Act should be listed therein, had been so listed. The act is of such a

The referee found that the interest in the trust should have been described in the bankrupt's schedules, but that the bankrupt was not guilty of any bad faith or concealment of assets or knowingly or intentionally making a false oath [Rec. p. 42], and denied both the petition for an order revoking the bankrupt's discharge and the petition for an order that the trustee was the owner of the bankrupt's interest in the trust. The District Judge adopted the referee's findings and order.

Summary of Argument.

1. THE LAW PRESUMES THAT THE OMISSION OF THE INTEREST IN THE TRUST FROM THE SCHEDULES WAS INTENTIONAL AND FRAUDULENT, AND THE BANKRUPT DID NOT OVERCOME THIS PRESUMPTION, AND HIS DISCHARGE SHOULD BE REVOKED UNDER SECTION 15 OF THE BANKRUPTCY ACT.

2. THE BANKRUPT WAS NOT WARRANTED IN RELYING UPON THE ADVICE OF COUNSEL WITH REFERENCE TO PLAIN, PALPABLE AND TRANSPARENT FACTS.

3. WHILE THE PROVISIONS OF THE TRUST PROHIBITED ALIENATION AND LEVY BY CREDITORS DURING ITS EXISTENCE, IT TERMINATED UPON THE DEATH OF EDITH HUFF, AND THE BANKRUPT COULD HAVE ASSIGNED HIS INTERST AT ANY TIME, EFFECTIVE AS OF THE DATE OF THE TERMINATION OF THE TRUST, AND THEREFORE TITLE TO THE BANKRUPT'S INTEREST PASSED TO THE TRUSTEE, EFFECTIVE AS OF THE DATE OF THE TERMINATION OF THE TRUST.

4. EVEN IF THE TITLE DID NOT PASS TO THE TRUSTEE, THE TRUSTEE IS IN THE POSITION OF THE MOST FAVORED CREDITOR AND IS ENTITLED TO THE SAME EQUITABLE RELIEF THAT WAS GIVEN THE PLAINTIFF IN KELLEY V. KELLEY.

ARGUMENT.

1. **The Law Presumes That the Omission of the Interest in the Trust From the Schedules Was Intentional and Fraudulent, and the Bankrupt Did Not Overcome This Presumption, and His Discharge Should Be Revoked Under Section 15 of the Bankruptcy Act.**

Bankruptcy Act, Section 15:

> "The Court may, upon application of parties in interest who have not been guilty of undue laches, filed at any time within one year after the discharge shall have been granted, revoke it if it shall be made to appear that it was obtained through the fraud of the bankrupt, that the knowledge of the fraud has come to the petitioners since the granting of the discharge and that the actual facts did not warrant the discharge."

The petition for an order revoking the discharge [Rec. pp. 5-6] alleged all the facts necessary under Section 15, and the referee found in favor of petitioner on all issues except that the discharge was obtained through the fraud of the bankrupt and that the actual facts did not warrant the discharge.

Farmers' Savings Bank, et al. v. Anton, 1 F. (2d) 103 (C. C. A. 8):

> "The filing of the petition in bankruptcy and the schedules, in legal effect, amounted to a solemn declaration and representation by the bankrupt to the bankruptcy court, the trustee and the creditors that every statement contained therein was true, and that every item of property belonging to the bankrupt and which under the Bankruptcy Act should be listed therein, had been so listed. The act is of such a

nature that its direct tendency is to disarm suspicion and halt investigation.

"That this is true will become apparent when it is remembered that the bankrupt in verifying the petition, 'makes solemn oath that the statements contained therein are true according to his best knowledge, information and belief, . . . that the schedules hereto annexed, marked Exhibit B, and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal' and is 'a statement of all his estate both real and personal in accordance with the Act of Congress relating to Bankruptcy'; and that the bankrupt possesses no other 'goods or personal property of any other description'.

"Because of the nature and tendency of the acts and declarations mentioned, the law presumes, if property which should have been included in the schedules is omitted therefrom, that its omission was intentional and fraudulent, and for the purpose of concealing the same with intent to hinder, delay and defraud his creditors. The burden is cast upon the bankrupt to overcome that presumption by a satisfactory explanation of the omission before he can obtain a discharge from his debts."

In re Shute, 38 F. (2d) 769 (C. C. A. 9):

"Because of the nature and tendency of the act and declarations mentioned, the law presumes, if property which should have been included in the schedules is omitted therefrom, that its omission was intentional and fraudulent, and for the purpose of concealing the same with intent to hinder, delay and defraud his creditors. The burden is cast upon the bankrupt to overcome that presumption by a satis-

> factory explanation of the omissions before he can obtain a discharge from his debts." . . .
>
> "If intelligent bankrupts can be relieved of the consequences of false statements in these returns for reasons which are here offered, the fear of a denial of a discharge would constitute no deterrent to concealment and falsity. Here, as elsewhere, if one to his own advantage and in careless disregard of the rights of others recklessly asserts to be true that which by use of means at hand he could easily learn to be untrue, he is chargeable with fraud."

Applying this court's language as used in the above decision to this matter, not only by use of the means at hand could the bankrupt have learned that the interest in the trust estate should have been scheduled, but also there was no facts that indicated that it could be properly omitted from the sworn schedules.

Evidence is required to overcome a presumption, and in this matter there is not only no such evidence, but, on the contrary, the evidence proves clearly that the conduct of the bankrupt in concealing the existence of the trust was deliberate and premeditated. The facts are similar to those in *Sinclair v. Butt,* 284 F. 568, where the Circuit Court of the Eighth Circuit said that the oath of the bankrupt was knowingly false because the assets omitted from the schedules were discussed by the bankrupt and his attorney before the schedules were made out. This is not a case where the asset was overlooked or was considered too trifling in value to be included, but one where the matter of the omission of the trust interest from the schedules was discussed several times, a brief was prepared, and both the bankrupt and his attorney knew that

it was being omitted and intended to omit it. The bankrupt had literally lived with this trust for probably fifteen years, and his attorney had a copy of it in his possession for months before the preparation of the schedules. They do not contend that they did not understand the nature of the document. The ground adopted by the bankrupt's attorney as a basis for the omission of the trust interest from the schedules, that the title thereto did not pass to the trustee in bankruptcy, is not only not the law, BUT THE VERY BRIEF WHICH THE ATTORNEY PREPARED AS AUTHORITY FOR HIS ADVICE CONTAINS NO AUTHORITY TO SUPPORT HIS POSITION, and the correct rule of law was available on every hand. In fact, it is impossible to comprehend how any attorney could spend, not fifteen or twenty hours, but two hours and not find the correct rule of law.

Let us put ourselves in the position of the bankrupt's attorney, advising our client in this matter, and having in mind all the duties and responsibilities of an attorney, as well as the effect on the client of a false oath, the concealment of assets, the possibility of the denial of a discharge and prosecution and imprisonment. It also requires a very unusual type of mind for an attorney to not consider his own position, the possible indictment for conspiracy to conceal assets, subordination of perjury and disbarment for advising the violation of a law.

The very wording of Schedule B-4 is of itself a most compelling authority for the inclusion in this schedule of any assets that might possibly come within the definitions therein set forth. The whole nature of the bankruptcy proceedings is such as to put even the veriest tyro on notice that this is a proceeding in which it has been neces-

sary to answer the most detailed questions concerning assets and wherein it was intended that the bankrupt shall describe everything he may own or expect to acquire, all in a serious proceeding under oath. There are no conditions that would justify the omission of the trust interest from the bankrupt's schedules. Including it in the schedules would not prejudice the bankrupt's rights. If he had any reservation or argument that the title did not pass such could be included in the schedules with the description of the trust interest.

Accompanying counsel for the bankrupt on his search for the law, and accepting, for the moment, his position that he would be justified in disregarding the plain mandate of the bankruptcy petition and schedules, let us see what he would find in a few moments' examination of some of the leading authorities on bankruptcy.

Probably the best known and most widely used text book on bankruptcy is Remington, section 577 of which is as follows:

> "Section 577. Schedule B. calls for a complete statement of all the property of the bankrupt. If property has been omitted from Schedule B the law presumes, in the absence of a showing to the contrary, that the omission is intentional and fraudulent. The burden is cast on the bankrupt to overcome the presumption by a satisfactory explanation of the omission before he can get his discharge."

Cited as authority for the foregoing text are the following decisions:

In re Shute. 38 F. (2d) 769 (C. C. A. 9);

Heilbronner v. L. Dinkelspiel Co., 20 F. (2d) 93;

Farmers Savings Bank v. Anton, 1 F. (2d) 103;
Sinclair v. Butt, 284 F. 568;
Siegel v. Cartel, 164 F. 691;
In re Breitling, 133 F. 146.

It would require but a moment to ascertain that the foregoing decisions all support the rule stated by Remington.

Section 577 of Remington then continues:

"When it is proven that the bankrupt had cash which he did not schedule, his discharge will be denied. In like manner, the deliberate failure to schedule insurance policies is not only concealment, but the verification of the schedule with such an omission in it constitutes a false oath within the meaning of Section 29b(2), 11 USCA 48b(2). It is the duty of the bankrupt to list all his insurance policies so that the trustee can consider them and determine to what extent they constitute assets. The bankrupt should not take the responsibility of determining this question. That the bankrupt believes it has no cash value is not sufficient excuse for not scheduling a policy. Omitting property on the advice of counsel on the ground that it is part of the bankrupt's exemption, even if the omission is in good faith, is a ground for denying the discharge.

"The amendatory Act of June 22, 1938, did not change the requirements as to scheduling property in reversion, remainder or expectancy, including property held in trust for the bankrupt, or subject to any power or right to dispose of or to charge. However, Section 70, 11 USCA 110, was amended so as to vest in the trustee certain interests which might vest in the bankrupt within six months of bankruptcy.

Accordingly, qualifying changes have been made in Schedule B-4 in which interests of the kind above set out are required to be listed. The change consists in a requirement that the bankrupt state the location of the property, the name and description of the person now enjoying the same, the value thereof, and from whom and in what manner the bankrupt's interest in such property is or will be derived. * * *

"The rule which requires the bankrupt to list all policies of insurance in order that the court may determine whether or not an interest therein passes to the estate, is paralleled by a similar rule which requires the bankrupt to list all property of every kind which may possibly be comprehended within the wide general terms set forth in Schedule B-4. The bankrupt must not assume to determine whether or not a contingent interest is one that will pass to the trustee of his estate. The form does not distinguish between vested and contingent interests. It is not unusual for a bankrupt to be required to report property which will not vest in the trustee of his estate. Exempt property is an instance. Another is property which passed under an assignment for the benefit of creditors more than four months before the bankruptcy, and another is the requirement in Schedule B-4 that the bankrupt report any interest in remainder, vested or contingent, or in expectancy.

"Where the ownership of the bankrupt is doubtful, and he omits property on the advice of counsel, he may succeed in getting his discharge over objections charging fraudulent concealment. The better course is to list everything in which an antagonistic creditor might claim the bankrupt had any interest, and accompany the listing with a statement of the name of the person whom the bankrupt regards as the owner rather than himself. * * *"

Corpus Juris Segundum seems to be one of Mr. Goldman's favorite text books. In his brief on which he spent fifteen to twenty hours to determine whether the interest in the trust should be scheduled he cites C. J. S. five times, all in volume 8, pages 482, 485, 631, 663, and the 1943 annotations. If he had just turned to page 1413 in volume 8, he would have found the following statement, concerning the omission of items from schedules:

> "That the omission was made on advice of counsel does not of itself excuse it."

As authority for the foregoing text the following decisions are cited:

In re Russell, 52 F. (2d) 794;
The Perel, 51 F. (2d) 506;
In re Merritt, 28 F. (2d) 679;
Sinclair v. Butt, 284 F. 568.

Reading further Mr. Goldman would have found the following statement:

> "It will be excused for such reason only if it also appears that the bankrupt stated the facts fully to his counsel, and that the advice of the latter was given and acted on in good faith, with regard to a matter of law only. He is not justified in relying on the advice of his attorney with reference to plain, palpable and transparent facts."

We could devote pages to quoting the text of all the various text books on bankruptcy, and the result would be to pile up quotation upon quotation similar to Remington and C. J. S. NOT ONE OF THESE TEXT BOOKS WOULD SUPPORT THE POSITION TAKEN BY MR. GOLDMAN.

IN NO TEXT BOOK OR DECISION AND IN NO PLACE IN THE LAW CAN SUPPORT BE FOUND FOR THE POSITION TAKEN BY MR. GOLDMAN, AND EVERY TEXT BOOK STATES THE LAW CONTRARY TO THE PRINCIPLE THAT MR. GOLDMAN TESTIFIED HE HAD DETERMINED TO BE THE LAW AS A RESULT OF FIFTEEN TO TWENTY HOURS STUDY.

Had Mr. Goldman desired to consider an authority citing decisions, it would not have required but a moment for him to have turned to perhaps the leading Federal authority, U. S. C. A. Bankruptcy, the sections comparing to Sections 14 and 15 of the Act, and found the following decisions:

Pollack v. Meyer Bros. Drug Co., 233 F. 861, where the bankrupt was a beneficiary under a trust in a state court proceeding, which was not listed in his schedules and the defense offered that because the title to the interest in the trust did not pass to the trustee in bankruptcy it need not be described in the schedules, and the court said:

> "It is not unusual to require a report of property which cannot be utilized by the trustee. For example, a bankrupt is required to report all the property which he claims as exempt, although all that can be done with it is to set it off to him. Again he is required to report what portion of the bankrupt estate has passed under assignment for benefit of creditors, although if it was more than four months before the bankruptcy, it cannot be recovered by the trustee. Other provisions might be cited but this is sufficient for our purposes. In other words, the rule requires the reporting of much property that may or may not be held by the trustee, that the court may determine its liability for the payment of debts. Such determination is a part of the administration of the

> estate. Bearing this in mind, the rules require the bankrupt to report any interest he had in remainder, vested or contingent, or in expectancy, and that he had an interest, either in remainder or expectancy, in this state court trust is beyond dispute."

Duggins v. Heffron, 128 F. (2d) 546, a decision by this court, where the bankrupt's discharge was denied on the ground he omitted property from his schedules, although the trustee was unsuccessful in his efforts to recover the property, and the defense was offered that the estate did not suffer by the omission—which will undoubtedly be argued here and of which we will have more to say later —and this court said:

> "The statute requires a disclosure of all the property of the estate to enable the trustee to investigate any claim so to hold it. It is the duty of the bankruptcy tribunal, or the court in a plenary suit, to pass on the results of the trustee's investigation, and not the privilege of the bankrupt to determine whether the bankrupt may have the benefits of bankruptcy and continue to own any particular property. That the concealment or false statement may not have injured the creditors is irrelevant."

Also *In re Macfarlane,* 45 F. (2d) 994, this court said:

> "In reaching this conclusion, we have assumed that it was the duty of the bankrupt to schedule her interest in the trust estate whether it was subject to administration in the bankrupcy court or not . . ."

What conclusion must be drawn from this startling situation? We submit that it must be that the bankrupt's attorney was not looking for the law on the question, but for an excuse, no matter how flimsy, for omitting the de-

scription of the interest in the trust from the schedules. Can any member of the legal profession avoid pondering with amazement on the colossal gall of this attorney who ignored the plain mandate of Schedule B-4, by-passed all the well known text books on bankruptcy, ignored the text of C. J. S. in the very volume from which he quoted in his brief, and then testified that, in honesty and good faith, he sought to ascertain the law on the subject, and believed that he had found it in the authority for the proposition that because the title to the interest in the trust did not pass to the trustee it need not be described in the schedules, WHEN HIS BRIEF CONTAINED NO AUTHORITY TO THAT EFFECT AND ALL THE LAW IS TO THE CONTRARY?

It was argued in the lower courts and undoubtedly will be here, that no harm was done by the omission of the trust interest from the schedules, because the title did not pass to the trustee, and he could not have taken any action had he known about it, and no one was injured. As this court said in *Heffron v. Duggins, supra*, injury to creditors is irrelevant, and it might have made a great deal of difference if Mrs. Huff had died four days sooner. They intended to conceal the existence of the trust and deceive the court and creditors, in which they were successful for ten months, and only the act of God in preserving Mrs. Huff's life four days longer enabled them to come out in the open and admit the existence of the trust, because they then believed that the trustee could not reach the trust interest.

Subdivision (a)(7) of Section 70 of the Bankruptcy Act, defining property, the title to which passes to the trustee in bankruptcy by operation of law, contains the

following language, which would include the bankrupt's interest in the trust estate if Mrs. Huff had died within six months:

> "Contingent remainders, executory devises and limitations, rights of entry for condition broken, rights of possibilities of reverter, and like interests in real property, which were non-assignable prior to bankruptcy and which, within six months thereafter became assignable interests or estates or give rise to powers in the bankrupt to acquire assignable interests or estate;"

The petition in bankruptcy was filed October 16, 1942 [Finding 1, Rec. p. 36]. Edith Huff died April 20, 1943 [Finding V, Rec. p. 39].

What would have happened to this interest in the trust if Edith Huff had died at any time within six months after the filing of the petition? Over ten months was to elapse before the trustee learned of the existence of the trust. The bankrupt would have had ample time to reduce his interest to cash, either by collection or sale. If they did not intend to conceal the trust interest and sneak it away from the creditors, why was it not included in the schedules so that the trustee might have taken action for the protection of the bankrupt estate in the event of the death of the aunt within six months?

Permit us to examine the reason assigned by the referee in his opinion for deciding that the bankrupt and his counsel acted in good faith:

> "In this case, however, as soon as the bankrupt and his counsel were confronted by the trustee with the information which he had secured in connection with the interest in the trust, they readily admitted the said interest." [Rec. p. 33.]

They kept quiet for almost a year—from the date they filed the petition on October 16, 1942, to the date the bankrupt filed his answer to our petition on October 13, 1943, and finally admitted it when they were compelled to answer under oath. What would have been necessary to show bad faith, more perjury? When you catch a burglar decamping with the family silver does he become any less a burglar by admitting that it is the silver he has in his sack?

The manner of this admission is also interesting. Paragraph V of the bankrupt's answer [Rec. p. 10] admits that he had knowledge of the existence of the trust, but also that he had knowledge that he would not be entitled to any property under it until the death of his aunt. THEREFORE HE ADMITS THAT HE KNEW THAT NO PROPERTY WAS HELD IN TRUST FOR HIM.

Note the manner of his denial of the trustee's allegation [Rec. p. 6] that the bankrupt was guilty of concealing assets and a false oath "by stating in Schedule B-4 filed herein that he had no property in reversion, remainder or expectancy, including property held in trust for him or subject to any power or right to dispose of or to charge":

> "Alleges that his statement in Schedule B-4, that he had no property subject to any right or power in him to dispose of or to charge, was true; denies that he falsely stated anything in Schedule B-4 or in any other section or portion of his schedules in bankruptcy or in his petition for bankruptcy."

They ignore the allegation concerning property in reversion, remainder or expectancy and property held in trust. Under the rules of pleading, does he not admit that he was guilty of concealment of assets and a false

oath by failing to deny that he stated in his schedules that he had no property in reversion, remainder or expectancy or property held in trust for him?

The Circuit Court of the Eighth Circuit in *Sinclair v. Butt,* 284 F. 568, disagreed with the referee and held that where the bankrupt and his attorney discussed the points involved in the schedules before the schedules were prepared, that the oath was knowingly false. If a false statement was knowingly made there can be no good faith.

Having commenced this bankruptcy proceeding for the purpose of protecting the valuable trust interest, with the idea that Mrs. Huff would die within six months and they would be able to conceal the existence of the trust from the court and creditors, their guilty consciences accused them, and instead of admitting that the purpose of the bankruptcy was the protection of the trust interest, they offered the most ridiculous explanation, as shown by the testimony of the bankrupt's attorney as follows:

> "Q. Well, when bankrupt first discussed the filing of this petition in bankruptcy, what reason did he give you for a desire to file a petition? A. He had been in the real estate business and the construction business, and because of the war that business had ceased, you couldn't get any more materials. He had been out of that business at that time for practically a year and a half and was simply eating up his accumulated earnings, trying to keep his office open. Furthermore, he had been inducted, not inducted, but he was taking his medical examination, and he had an obligation to his brother-in-law coming due of many thousands of dollars, and if he went into the army he wanted to feel free and easy about his obligations, and I suggested that under the circumstances he had a right to file bankruptcy.

Q. Did he say anything to you about the fact that his aunt was getting quite old and her health was not any too good, and he had better get this thing cleared up before she died, so the creditors wouldn't grab it?

. . . . . .

A. The answer is no." [Rec. pp. 103-105.]

Let us take this explanation apart and see how utterly ridiculous it is.

> "He had been in the real estate business and the construction business, and because of the war that business had ceased, you couldn't get any more materials."

Did everyone in the real estate and construction business go into bankruptcy because of the war? Real estate activity, as shown by the recordings in the public records, increased tremendously after the commencement of the war. As shown by the building permits issued in Los Angeles County, building construction has been carried on in a large volume since the war commenced. There has been a manpower shortage and a great demand for persons experienced in construction work.

> "He had been out of that business at that time for practically a year and a half and he was simply eating up his accumulated earnings, trying to keep his office open."

How would bankruptcy improve that situation? Instead of eating up the accumulated earnings slowly and getting the benefit of them, he would be required to pay them all immediately to the trustee.

Then the statement about being inducted in the army and his desire to feel free about his obligations. No action could be prosecuted against him while he was in the

army. His attorney's statement that under those circumstances he had a right to file bankruptcy. Any citizen possesses such right and he cannot be called upon for explanations of any kind, and no reasons need be given beyond the mere desire.

A bankruptcy proceeding is not a trivial or inconsequential matter. It possesses a stigma in the minds of the general public that induces almost everyone to resort to every possible device to avoid it. It is a proceeding of some little expense.

Of course, if he had a valuable trust estate that he would receive on the death of his aunt, and if she was old and in poor health and might die at any time—and did die in six months and four days—and he wanted to avoid paying his creditors, then a most compelling reason existed for the bankruptcy proceedings. To say that a bankruptcy proceeding would be filed for the trivial reasons Mr. Goldman gave, and that no mention was made of the protection of the trust interest, the only assets of any substantial value that might be jeopardized, is so crudely false that if it had not been prompted by such wicked motives and in such a serious matter, would be laughable. The bankrupt and his attorney undoubtedly discussed the matter many times, and weighed every fact, as only a couple of conspirators could, and reached the conclusion that Mrs. Huff would probably die within six months—they were only four days wrong—and that they could conceal the trust and the estate would be closed and the creditors never learn of its existence. Had they not been conspiring Mr. Goldman would have admitted the obvious, that the protection of the trust estate was the purpose of the bankruptcy proceeding. The murderer avoids talking about where the body is buried.

2. **The Bankrupt Was Not Warranted in Relying Upon the Advice of Counsel With Reference to Plain, Palpable and Transparent Facts.**

The bankrupt was guilty of a false oath and the concealment of the trust interest which, to say the least, was an asset in which the trustee had a possible contingent interest, and one of which he was entitled to all the information required in Schedule B-4. The bankrupt's conduct was with knowledge and intent, because the very question was discussed by himself and his attorney, but it is excused on the ground that he relied on the advice of counsel. If we assume that the advice of counsel was given in good faith—one of the necessary elements—which we submit would be difficult for even the most credulous, still the advice of counsel cannot be used to shield a bankrupt from the consequences of frauds and crimes when the question involved is plain and transparent, a question of fact only and in no sense a question of law.

In re Breitling, 133 F. 146 (C. C. A. 7):

> "If it be doubtful whether a specific item of property should go to creditors or be reserved by the bankrupt, it is not for him to constitute himself the judge, concealing the fact, but it is his duty to disclose the transaction, that the bankrupt court may determine the right. In re Gailey, 62 C. C. A. 336, 127 Fed. 538."

Sinclair v. Butt, 284 F. 568 (C. C. A. 8):

"It is admitted in argument that the oath of the bankrupt was knowingly false. The testimony of the bankrupt and his attorney is to the effect that the very points involved were discussed by them before the schedules were made out. * * *

"The bankrupt must be held to have intended the natural and necessary consequences of his own acts. He is not warranted in relying upon the advice of counsel with reference to plain, palpable and transparent facts. It was not within the province of the bankrupt and his counsel to say that the amount involved was small and that therefore it would be properly disregarded. In re Breitling, 133 F. 146, 66 C. C. A. 212."

In re Perel, 51 F. (2d) 506:

"It is also true that the advice of counsel on a 'plain, palpable and transparent fact' (In re Breitling (C. C. A.) 133 Fed. 146) that is, as here, that property which he owns without dispute or question does not have to be scheduled, is not a defense (In re Merritt (C. C. A.) 28 F. (2d); Sinclair v. Butt (C. C. A.) 284 F. 568)."

3. **While the Provisions of the Trust Prohibited Alienation and Levy by Creditors During Its Existence, It Terminated Upon the Death of Edith Huff, and the Bankrupt Could Have Assigned His Interest at Any Time, Effective as of the Date of the Termination of the Trust, and Therefore the Title to the Bankrupt's Interest Passed to the Trustee, Effective as of the Date of the Termination of the Trust.**

Section 70a (5) of the Bankruptcy Act, in defining property, the title to which passes to the trustee by operation of law upon the filing of the petition in bankruptcy, provides:

> "Property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered . . ."

Finding III [Rec. pp. 36-39] sets forth the provisions of the declaration of trust material to this proceeding, the effect of which is that the beneficiaries cannot alienate their interests in the trust "during the entire term thereof", nor are such interests subject to the claims of creditors, and the trust terminates upon the death of Edith Huff.

The doctrine of non-assignability of interests in property has in recent decisions been seriously questioned and frequently denied. The tendency is to do away with restraints upon the power to assign. Such tendency is well illustrated by the following cases.

M. Witmark & Son v. Fred Fisher Music Company, 125 Fed. (2d) 949 (C. C. A. 2);

Kelley v. Kelley, 11 Cal. (2d) 356.

In *Witmark v. Fisher, supra,* the court had under consideration the right to renew a copyright by the assignees of the author of the publication. After discussing the provisions of the Act of Congress which it was contended prohibited the assignment, the court said:

> "This conclusion is reinforced by the history of judicial disapproval of restraints on assignability. Thus lawyers discovered a way around the archaic rule against assignment of choses in action, courts of equity supported them directly and courts of law winked at the result. Cook, op. cit. *supra.* Equally familiar are the general rules against restraints on alienation of property. There may be mentioned, also, the unsuccessful attempts of employers to prevent wage assignments and the consequent specific legislation forbidding or regulating such assignments. One such statute was even declared unconstitutional. Massie v. Cessna, 239 Ill. 352, 88 N. E. 152, 28 L. R. A., N. S., 1108, 130 Am. St. Rep. 234; see, generally, Fortas, Wage Assignments in Chicago, 42 Yale L. J. 526. And there is the unusual case of an unenforceable assignment of an interest under a spendthrift trust being enforced by the pleasant fiction of calling it a 'contract to assign,' with the amount assigned as the measure of damages. Kelly v. Kelly, 11 Cal. 2d 356, 79 P. 2d 1059, 1064, 119 A. L. R. 71; 48 Yale L. J. 666. Further, there is our own recent holding that an assignment of an expectancy under a will is valid. In re Barnett, *supra;* 3 Restatement, Property, Sec. 316; and so generally of contingent interests in modern law, 2 Restatement, Property, Sec. 162. Our society still rests on the theory that men can ordinarily make free disposition of their property rights."

In *Kelley v. Kelley, supra,* the Supreme Court of California sums up the law of California on the subject and holds that to permit beneficiaries under such a trust to alienate their interests, or to permit levies thereon by creditors would do violence to the intent of the trustor, but said:

> "An assignment by the beneficiary in the nature of a promise to pay or turn over trust property when received by him, is not wholly void."

The test of whether title passes to the trustee is whether or not it is property "which the bankrupt could by any means have transferred." The defendant in *Kelley v. Kelley* effectively transferred his interest, because the Supreme Court awarded the plaintiff a judgment for the amount involved. The bankrupt relies on the rule laid down in *Kelley v. Kelley* to the extent that it holds that the trust interest is not assignable or subject to levy, but denies its application when it would result in allowing the trustee the same relief the plaintiff received in that case.

The trust only prohibited assignments "during the entire term thereof", and an assignment that did not become effective until the termination of the trust, would not be an assignment made "during the entire term thereof", because the assignment would not be made until the trust had terminated. Therefore, on the date of the filing of the petition in bankruptcy, the bankrupt could have assigned the trust interest to a trustee for the benefit of his creditors effective as of the date of the termination of the trust, and such assignment would have been effective, and therefore the title to the trust interest passed by operation of law to the trustee in bankruptcy.

4. **Even if the Title Did Not Pass to the Trustee, the Trustee Is in the Position of the Most Favored Creditor and Is Entitled to the Same Equitable Relief That Was Given the Plaintiff in Kelley v. Kelley.**

The referee and counsel for the bankrupt conceded at the hearing of this matter that had the trustee, for instance, advanced money to the bankrupt prior to the filing of the petition and taken an assignment of the trust interest as security, he would have been entitled to the same relief that the California Supreme Court gave the plaintiff in *Kelley v. Kelley.* The trustee is in the position of the most favored creditor, and if a creditor for an immediate consideration is entitled to equitable relief, why could not the bankrupt, in consideration of forbearance, for instance, which is as good as any other consideration, have assigned his interest in the trust estate to an assignee for the benefit of his creditors? Such an assignment would have been in the same category as that made in *Kelley v .Kelley* which was held effective in practical effect by the Supreme Court of California. In applying the definition "which the bankrupt could by any means have transferred", it is presumed that the bankrupt took every action within his power to effect the assignment. To deny the trustee at least the same relief that was given the plaintiff in *Kelley v. Kelley,* will be to set aside the rule long recognized in bankruptcy, that the trustee is in the position of the most favored creditor, and reduce the

trustee to a subordinate position that was never intended by Congress in the adoption of the Bankruptcy Act.

We respectfully submit that by the decision of the lower courts the creditors of this bankrupt estate have been done a great injustice, and that the order should be reversed on all grounds.

Respectfully submitted,

EARL E. MOSS and
LOUIS LOMBARDI,

By EARL E. MOSS,

Attorneys for Appellant.